IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION.
WRIT PETITION NO.3744 OF 2006

The Society of St. Peter's
High School Panchgani, .. Petitioner.
Vs
Mrs Rosalind Clearance Joseph, .. Respondent

Smt. Sheetal Kumar i/b Milan Bhise & Co for the petitioner.
Mr L.H.Gaikwad, for the respondent.

CORAM : D.B.BHOSALE,J.
DATE : 28.08.2006

PC:

1. Heard the learned counsel for the parties.

2. Rule. Returnable forthwith. Mr Gaikwad, learned counsel, waives service for the respondent. By consent, rule is heard forthwith.

3. This petition is directed against the order dated 15.2.2006 passed by the Jt Civil Judge, Jr Dn., Wai, rejecting the application dated 9.1.2006 (Exhibit-2) seeking amendment of the plaint. Ms. Sheetal Kumar, learned counsel for the petitioner, submitted that the trial Court ought to have granted this application since the amendment was necessary for the purpose of determining the real questions in controversy between the parties. She further submitted that the suit was on sine die list and, therefore, no prejudice would have caused to the respondent if the amendment was allowed. On the other hand, Mr. Gaikwad,

learned counsel for the respondent, submitted that the suit itself is not maintainable and, therefore, the application was rightly rejected by the learned Judge.

4. The grounds on which the application was rejected by the trial Court are mainly reflected in paragraph 8 of the impugned order. Paragraph 8 reads thus:

> "8. Considering these facts, it is crystal clear that the suit property is owned by above mention trust. it further discloses that neither the Government body, nor the Principal has any right to appoint any authorize person. Under these circumstances, if the amendment is allowed, then no effective orders can be passed. Considering all these facts, to my mind, this authorized person cannot suit on behalf of the school. No doubt, while deciding amendment application, merits of the case are not to be considered. However, at the same time, it must be borne in mind that prevention is always better than cure. Therefore, I held that this application is not tenable. Therefore, proposed amendment cannot be allowed. Hence, considering all these facts and the circumstances of the case, I proceed to pass following order.
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> ORDER
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> 1. Application stands rejected.
> 2. Costs in the cause of the application."

From perusal of the reasons recorded in paragraph 8 it is clear that the learned Judge has endeavoured to enter into the merits of the amendment, sought to be introduced by the petitioner which, in my opinion, was not open to the learned Judge while dealing with the

application for amendment. Looking to the stage of the proceedings, the learned Judge ought to have allowed the application. The law is well settled that the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. The court can not go into the correctness or falsity of the case in the amendment and record a finding on merits of the amendment. Keeping that in view and considering the overall facts and circumstances of the case, I am inclined to allow this application. Hence, the following order.

(a) The application dated 9.1.06 (Exhibit-2) is allowed. The petitioner-plaintiff is directed to carry out the amendment within four weeks from today. Liberty to the respondents to file additional written statement, if they are so advised, within four weeks therefrom. Insofar as the contention advanced by Mr Gaikwad as to the maintainability of the suit is concerned, it is open for the respondents to raise it before the trial court at an appropriate stage of the proceedings and if such contention is raised same may be considered on merits in accordance with law.

(b) With these observations, the rule is disposed of.

(D.B.BHOSALE,J.)